(3)

No. 90-1343

Supreme Court, U.S.
FILED
APR 4 1991
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In The

Supreme Court of the United States

October Term, 1990

REVEREND ROBERT LEE BOND,

Petitioner,

v.

ST. JOSEPH HOSPITAL, INC.,
ROBERT COFFEY, M.D.,
DR. DWAIN McDONALD, AND
MRS. DWAIN (JANE) McDONALD,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeals For The Second Supreme Judicial District Of Texas At Forth Worth

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS, DR. DWAIN McDONALD AND MRS. DWAIN (JANE) McDONALD

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RESPONSE TO QUESTIONS PRESENTED FOR REVIEW

Whether the holding of the Court of Appeals of Texas, Second Supreme Judicial District, Fort Worth, Texas, in No. 2-88-095-CV styled, *Reverend Robert Lee Bond v. St. Joseph Hospital, Inc., Robert Coffey, M.D., Dr. Dwain McDonald and Mrs. Dwain (Jane) McDonald* (opinion unpublished), violates Bond's rights under the Fourteenth Amendment because it overruled points of error challenging the rulings of the trial court on evidentiary points under Texas law.

LIST OF ALL PARTIES

The following are parties to this case:

Reverend Robert Lee Bond, Petitioner
Dr. Dwain McDonald, Respondent
Mrs. Dwain (Jane) McDonald, Respondent
St. Joseph Hospital, Inc., Respondent
Robert Coffey, M.D., Respondent

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STATEMENT OF THE CASE

Respondents, Dr. Dwain McDonald and Mrs. Dwain (Jane) McDonald ("the McDonalds"), disagree with Petitioner's statement of the case to the extent that it alleges the McDonalds breached "medical and emotional confidences" causing Petitioner to be terminated as senior pastor of First Christian Church at Fort Worth, Texas. The McDonalds further disagree with Petitioner's contention that Dr. Dwain McDonald prescribed a drug to Petitioner which injured Petitioner. Neither the evidence nor the jury findings in the trial court support these contentions.

REASONS FOR DENYING THE WRIT

This case is entirely unworthy of review by this honorable Supreme Court. First, the case should be disposed of without review for failure to raise the constitutional issues in the courts below. Second, the Petition for Writ of Certiorari does not raise a federal question appropriate for review. Even assuming the appeals court was wrong in overruling Petitioner's points of error under Texas state law, the erroneous ruling would not create a federal constitutional question.

I. THE FOURTEENTH AMENDMENT CLAIMS WERE NOT RAISED BELOW AND THEREFORE CANNOT BE CONSIDERED HERE.

Petitioner submitted an appendix to the Petition for Writ of Certiorari which sets forth a portion of the unpublished opinion of the Court of Appeals for the Second Supreme Judicial District, Fort Worth, Texas, No.

2-88-095-CV, *Bond v. St. Joseph Hospital, Inc., et al* (Tex. App. – Fort Worth 1990, writ denied); denial of review by the Supreme Court of Texas and denial of Petitioner's Motion for Rehearing of the Application for Writ of Error to the Supreme Court of Texas. (*See* Appendix to Petition for Writ of Certiorari at 1-5). The appendix demonstrates that Petitioner failed to raise his constitutional challenge in any of the assignments of error presented to the courts below. A copy of the assignments of error presented to the Court of Appeals for the Second Supreme Judicial District and the Supreme Court of Texas are reprinted at Appendices "A" and "B", respectively, to this brief.

Petitioner's failure to assert his constitutional arguments in the courts below precludes review by this Court. It is the long-standing rule of this Court that review of a final judgment of a state court may only be had if the record reflects, either expressly or by clear implication, that the federal question was pressed or passed upon below. *E.g., Webb v. Webb*, 451 U.S. 493, 496-97, 101 S. Ct. 1889, 1892, 68 L. Ed. 2d 392 (1981); *Tacon v. Arizona*, 410 U.S. 351, 352, 93 S. Ct. 998, 999, 35 L. Ed. 2d 346 (1973); *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S. Ct. 1161, 1162-163, 22 L. Ed. 2d 398 (1969). This rule requires that there be no doubt from the record that the state courts were apprised of the nature and substance of the federal claim in accordance with the time and manner prescribed by state law. *Webb v. Webb*, 451 U.S. at 501, 101 S. Ct. at 1894, 68 L. Ed. 2d 392. Texas follows the general rule that issues, including constitutional ones, raised for the first time on appeal are waived. *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 856 (Tex. App. – Houston [1st Dist.] 1987, writ ref'd n.r.e.). Petitioner asserted that his Fourteenth

Amendment rights to equal protection and due process had been violated for the first time in his Petition for Writ of Certiorari to this Court. As a result, there is no occasion for certiorari review here.

II. PETITIONER'S FOURTEENTH AMENDMENT CLAIMS DO NOT RAISE A FEDERAL QUESTION APPROPRIATE FOR REVIEW.

Petitioner asserts that the holding of the state appellate court denied him equal protection and due process. Even assuming for the purpose of this brief that the state court was wrong in its decision regarding the disclosure of confidential information, this would not create a constitutional basis for challenging the decision. This point was clearly made by this Court in *Patterson v. Colorado*, 205 U.S. 454, 27 S. Ct. 556, 51 L. Ed. 879 (1907), where the Court said:

> The decision of a [state] court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth Amendment merely because it is wrong. . . .

Id. at 461, 27 S. Ct. at 557, 51 L. Ed. 879. More recently, in *Gryger v. Burke*, 334 U.S. 728, 68 S. Ct. 1256, 92 L. Ed. 2d 1683 (1948), this Court observed:

> We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.

Id. at 731, 68 S. Ct. at 1258, 92 L. Ed. 2d 1683; *see also Wainwright v. Goode*, 464 U.S. 78, 86, 104 S. Ct. 378, 383, 78 Ed. 2d 187 (1983).

Petitioner has not alleged here that the process by which the Texas appeals court decision was made was inconsistent with the requirements of due process or equal protection. Accordingly, Petitioner's objection to the state court's application of state law does not give rise to a constitutional claim. *Agins v. City of Tiburon*, 447 U.S. 255, 259 n.6, 100 S. Ct. 2138, 2141 n.6, 65 L. Ed. 2d 106 (1980).

CONCLUSION AND PRAYER

The McDonalds respectfully maintain that the Petitioner's constitutional claims were waived below and, therefore, cannot be heard here. In any event, the Petitioner's complaints with respect to the state appeals court application of state law to the specific facts of this case does not give rise to a constitutional claim which is capable or worthy of review. The McDonalds, therefore, request that the Petition for Writ of Certiorari be denied, and, alternatively, that this Court affirm the judgment of the court of appeals. The McDonalds further pray that they recover their costs and for such other and further relief to which they may be entitled.

Respectfully submitted,

By: _____
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Additional Counsel for Respondents, Dr. Duain McDonald And Mrs. Duain (Jane) McDonald

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument was mailed, certified mail, return receipt requested to Bernard J. Dolenz, J.D., M.D., 6102 Swiss Avenue, Dallas, Texas 75214, Attorney for Petitioner, Reverend Robert Lee Bond, and to Ms. Evelyn R. Leopold, Cantey & Hanger, 801 Cherry Street, Suite 2100, Forth Worth, Texas 76102, Attorney for Respondents, St. Joseph Hospital, Inc., and Robert Coffey, M.D., on the 4th day of April, 1991.

_____

John Hill Cayce, Jr.

APPENDIX A

IN THE
COURT OF APPEALS
FOR THE
SECOND SUPREME JUDICIAL DISTRICT
OF TEXAS
AT FORT WORTH
NO. 2-88-095-CV

REVEREND ROBERT LEE BOND, *Appellant*,
v.
ST. JOSEPH'S HOSPITAL, ET AL, *Appellees*.

PARTIES

In order that the Justices of this Court may evaluate possible disqualification or refusal, the following list of all parties is provided:

Plaintiff-Appellant
REVEREND ROBERT LEE BOND

Defendants-Appellees
ST. JOSEPH'S HOSPITAL, INC.
DR. DWAIN MCDONALD
MRS. DWAIN (JANE) MCDONALD
DR. ROBERT COFFEY

REQUEST FOR ORAL ARGUMENT

Because appellant is of the opinion that oral argument will be of help to this Court in resolving the legal issues involved in this appeal, appellant, pursuant to Rule 75(f) files this request for oral argument.

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THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

REVEREND ROBERT LEE BOND, *Petitioner*

v.

ST. JOSEPH'S HOSPITAL, INC.,
ROBERT COFFEY, M.D.,
DR. DWAIN McDONALD, and
MRS. DWAIN (JANE) McDONALD, *Respondents*

Appealed from the 352nd Judicial District
Court and from the Second Supreme
Judicial District of Texas
No. 2-88-095-CV
of Tarrant County, Texas

WRIT OF ERROR

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ATTORNEY FOR
PETITIONER

NAMES OF ALL PARTIES

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Plaintiff-Appellant/Petitioner
REVEREND ROBERT LEE BOND

Defendants-Appellees/Respondents

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MRS. DWAIN (JANE) McDONALD
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NO. 33: THE APPEALS COURT ERRED IN HOLDING THAT DISCLOSURE OF CONFIDENTIAL INFORMATION OR RECORDS UPON THE VERBAL REQUEST OF

THE PATIENT/CLIENT IS NOT VIOLATIVE OF THE PROVISIONS OF ART. 5561h. (CA OPINION P. 21).

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